No. 05-

IN THE

Supreme Court of the United States

RUEL D. LATOJA,

Petitioner,

v.

CARNIVAL CORPORATION, d/b/a
CARNIVAL CRUISE LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal Arbitration Act, 9 U.S.C. Ch. 1, § 1, "Exception to Title" exclusion of seamen's employment contracts from arbitration apply to 9 U.S.C. Ch. 2, § 202, excluding foreign seamen's employment contracts from arbitration under the Convention on the Recognition and Enforcement of Arbitral Awards and the Convention Act, 9 U.S.C. §§ 201-208?

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Ruel D. Latoja, a Filipino seaman injured at sea while working aboard the *M/S Paradise*, a vessel owned and operated by Respondent Carnival Cruise Lines, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which denied him his statutory and common law remedies historically afforded to maritime workers. The court below affirmed an Order of the district court compelling arbitration, relying on binding Circuit precedent, *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir.), *pet. for cert. dismissed*, 125 S. Ct. 2954 (2005) (reprinted at App. D), which held that the Federal Arbitration Act "exception to title" exclusion of seamen's employment contracts from arbitration (9 U.S.C. Ch. 1, § 1) does not apply to foreign seamen's contracts under the Convention Act (9 U.S.C. Ch. 2, §§ 201-208), which implemented the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The decision, depriving petitioner and other foreign seamen of their federal Jones Act and other common law judicial remedies for maritime employment-related injuries, and relegating Petitioner to the limited economic relief available through arbitration in the Philippines, presents an important question of federal statutory construction warranting review by this Court.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unreported, and is reprinted in the Appendix at App. A, 1a-2a. The final Order of the United States District Court for the Southern District of Florida, compelling arbitration, is also unreported, and is reprinted in the Appendix at App. C, 5a-19a. An administrative order of the District Court, closing the case, is reprinted at App. B,

3a-4a. As noted above, the *Bautista* decision of the Eleventh Circuit Court of Appeals is also included, at App. D, because it dictated the outcome of this case.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was issued on September 21, 2005. App. 1a-2a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. Ch. 1, § 1 "Maritime transactions" and "commerce" defined; exceptions to operation of title

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but *nothing herein contained shall apply to contracts of employment of seamen*, railroad employees, or any other class of workers *engaged in foreign or interstate commerce*. (emphasis supplied).

9 U.S.C. Ch. 2, § 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. Ch. 2, § 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. Ch. 2, § 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

9 U.S.C. Ch. 2, § 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

9 U.S.C. Ch. 2, § 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

9 U.S.C. Ch. 2, § 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. Ch. 2, § 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

STATEMENT

Petitioner Ruel Latoja, a Filipino seaman, filed a Complaint in state court in Miami-Dade County, Florida, against Respondent Carnival Cruise Lines, a Panamanian corporation operating within the jurisdiction of the State of Florida. He sought damages for back injuries suffered at sea due to lifting heavy objects while working as a crew-member and cook aboard the *M/S Paradise*, a Carnival vessel. Latoja asserted causes of action for negligence, unseaworthiness, and failure to provide maintenance and cure under the Jones Act (46 U.S.C. App. § 688(a)) and the general maritime law of the United States.

Carnival removed the case to the United States District Court, Southern District of Florida, pursuant to 28 U.S.C. § 1441, *et seq.*, and 9 U.S.C. § 205 (*see supra*, p. 4). Thereafter, both parties sought to end the federal district court litigation, albeit with different goals and through different routes. Latoja filed a Motion to Remand to state court, arguing that seamen's contracts are exempt from arbitration. Carnival filed a Motion to Compel Arbitration in the Philippines, invoking the provisions of a Philippine Overseas Employment Administration (POEA) Contract of Employment, signed by Latoja, which incorporates the dispute resolution and arbitration provisions of the Standard Terms and Conditions Governing the Employment of Filipino Seafarers On Board Ocean-Going vessels (the "Standard Terms"). Section 29 of the Standard Terms governs Dispute Settlement Procedures and contains an arbitration provision:

> In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or

> dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators. If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the National Labor Relations Commission (NLRC), pursuant to Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 or to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators to be appointed by the parties, the same shall be appointed from the accredited voluntary arbitrators of the National Conciliation and Mediation Board of the Department of Labor and Employment.

The District Court granted Carnival's Motion to Compel Arbitration, concluding that "this dispute should be submitted to arbitration pursuant to the terms of the parties' employment contract." App. C, p. 17a. Accordingly, the court denied Latoja's Motion to Remand, and closed the case. App. B.

Latoja's appeal to the Eleventh Circuit Court of Appeals was held in abeyance pending a decision in a then-pending similar case, *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005), *pet for cert. dismissed*, 125 S. Ct. 2954 (2005), which was ultimately decided adversely to the seamen. (*see* App. D). Thus, after briefing, the Eleventh Circuit affirmed the order compelling arbitration in this case without further discussion:

> As the appellant, Ruel D. Latoja, candidly concedes, his position in this appeal is squarely

> foreclosed by our decision earlier this year in *Bautista v. Star Cruises*. . . . There is no material distinction between the two cases. Latoja seeks only to preserve his ability to seek certiorari review in the United States Supreme Court, and he has done that.

App. A, p. 1a-2a.

This Court's consideration of the *Bautista* plaintiffs' petition for certiorari (No. 04-1406) was pretermitted by settlements and mootness. Latoja now seeks review of the decision below, and the *Bautista* foundation upon which it rests.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD ANSWER THE IMPORTANT QUESTION OF WHETHER SEAMEN, A TRADITIONALLY PROTECTED CLASS, WHOSE CONTRACTS ARE EXCLUDED FROM ARBITRATION UNDER THE FEDERAL ARBITRATION ACT, CAN BE COMPELLED TO ARBITRATE UNDER THE CONVENTION ACT

The decision below, buoyed by *Bautista*, presents the important but unanswered question of whether the Federal Arbitration Act's Title 9 U.S.C. § 1 "exception to title" exclusion of seamen's contracts from arbitration applies to seamen whose employers seek to compel arbitration under the Title 9 U.S.C. §§ 201-208, the "Convention Act." If words have meaning, the answer should be "yes," the exclusion applies to the Convention Act. The answer is "yes" because the national law of the United States is that is that seamen's contracts are not "commercial," and when the United States ratified the Convention on the Recognition and Enforcement

of Foreign Arbitral Awards (9 U.S.C. §§ 201-208 (the "Convention Act"), it did so with this caveat:

> The United States of America will apply the Convention *only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the United States.*

9 U.S.C. § 201 (HISTORICAL AND STATUTORY NOTES) (footnote 29 to the Convention) (emphasis supplied); *see* App. D, 33a-34a ("When the United States acceded to the Convention in 1970, it exercised is right to limit the Convention's application to commercial legal relationships as defined by the law of the United States").[1] Contrary to the view of the Eleventh Circuit in *Bautista* and the Fifth Circuit in *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030 (2002), the plain language of the Federal Arbitration Act establishes the national law of the United States – seamen's employment contracts are not

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1. Article I, § 3 of the Convention provides that a ratifying State may so limit its acceptance of the Convention's provisions:

> 3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. *It may also declare that it will apply the Convention only to the differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.* (emphasis supplied).

"commercial," and are not subject to arbitration. The first section of "Chapter 1 – General Provisions," Title 9 U.S.C. § 1, which defines "commerce" and announces "exceptions to operation of *title*" (emphasis supplied), provides that "*nothing herein contained shall apply to contracts of employment of seamen*, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (emphasis supplied). *See* pages 2-5, *supra*, setting forth the complete statute. This Court has recognized the seamen's exemption in the Federal Arbitration Act. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) ("If all contracts of employment are beyond the scope of the Act under the [9 U.S.C.] § 2 coverage provision, the separate exemption for 'contracts of employment of seamen . . . engaged in . . . interstate commerce' would be pointless.").

Since the syllogism seems so simple – seamen's contracts are not subject to arbitration under the national law of the United States, the United States ratified the Convention and enacted the Convention Act subject to the national law of the United States, therefore seamen's contracts should not be arbitrable under the Convention Act – one wonders how two courts of appeals found a way to avoid the plain meaning of the words of the Title 9 U.S.C. § 1 "exception to operation of title" and the [Convention] footnote 29 explanation of the United States' adoption of the Convention.

The decision below and its *Bautista* foundation were built upon the Fifth Circuit's decision in *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030 (2002). The *Bautista* court wrote "We see no reason to diverge from the sensible reasoning of our sister Circuit." App. D, 41a. The *Francisco* reasoning was that there was no explicit exception for seamen employment contracts

under the Convention Act, and that seamen's employment contracts are "commercial," as required under the Convention Act. *Id.*, *quoting Francisco*, 293 F.3d at 274.

Critiquing *Bautista*, or arguing that the decision below and *Bautista* were wrongly decided, does not provide a basis for certiorari, but doubts about the correctness of the decision below are relevant. Even *Francisco* acknowledged the strength of the seamen's arguments, agreeing that seamen are excluded under the Federal Arbitration Act; that "the use of the term [exceptions to operation of] 'title' in the heading [of 9 U.S.C. § 1] is helpful to Francisco" (293 F.3d at 275), and that "Francisco also points to legislative history which is helpful to him." *Id.* Add to that the fact that the district court in *Bautista* characterized the anti-*Francisco* arguments as "compelling"[2] [albeit not prevailing], and it is apparent that the seamen's arguments merit close scrutiny.

But the Eleventh Circuit in *Bautista*, like the court in *Francisco*, was swept away by the "residual application" provision of Title 9 § 208: "Chapter 1 [the FAA] applies to actions and proceedings brought under this chapter [2] to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." That section led the *Bautista* court (and the Fifth Circuit in *Francisco*) to conclude that the seamen exclusion did not carry over to the Convention, writing:

> A conflict exists between the FAA seamen exemption, which is narrow and specific, and the language of the Convention and the Convention

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2. *Bautista v. Star Cruises*, 286 F. Supp. 2d 1352, 1360 (S.D. Fla. 2003).

> Act, which is broad and generic. . . . Because the Convention Act covers commercial legal relationships without exception, it conflicts with section 1, an FAA provision that exempts certain employment agreements that – but for the exemption – would be commercial legal relationships.

App. D, 40a.

That view tortures the plain meaning of "conflict." "Conflict" means "to come into collision or disagreement; be contradictory, at variance, or in opposition; clash." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, 428 (1996). There is no conflict because the Convention Act does not mention seamen's contracts and because there is no definition in the Convention Act of "maritime transactions," "commerce," or "commercial" that contradicts the Title 9 § 1 exclusion of seamen in the definitions of maritime transactions and commerce.

The Convention Act's silence on the subject of maritime transactions, commerce, and seamen's contracts cannot be said to create "conflict" where another, express provision of the title specifically addresses the subject. The Title 9 § 202 description of "a transaction, contract or agreement described in section 2 *of this title*" [*i.e.*, "Arbitration"] (emphasis supplied), as modified by the § 1 "*exceptions to operation of title*" (emphasis supplied) exclusion of seamen's contracts, stands as the only congressional definition of what is subject to, or not subject to, arbitration.

Bautista recognized that the testimony of the State Department official most knowledgeable about the

Convention, testimony that was the heart of the Senate Committee Report, favored the seamen's arguments. Ambassador Richard Kearney testified that "'the definition of commerce contained in section 1 of the original Arbitration Act is the national law definition for the purposes of the declaration.'" App. D, 38a-39a. The Eleventh Circuit avoided the import of that statement this way: "Although it is plausible to infer from Ambassador Kearney's comments that he believed the section 1 exemptions should apply to the Convention Act, his views as a single State Department official are a relatively unreliable indicator of statutory intent." App. D, 39a.

But Ambassador Kearney was the government representative actually charged with the duty of advising the Senate on the understandings of the United States, entitling his view to "great deference." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). And the fact that the Foreign Relations Committee made Kearney's testimony the centerpiece of its Report, that Kearney and the Committee recognized that the § 1 definition of commerce "is the national law" definition for purposes of the Convention (S. Comm. on Foreign Relations, Foreign Arbitral Awards, S. Rep. No. 91-702 at 6, 1970), and that the ratification of the Convention was limited to matters "considered as commercial under the National Law of the United States" (Convention, n. 29), underscores how hard the Eleventh Circuit had to work in *Bautista* to avoid the plain language of the law, the plain language of the legislative history, and the plain language of the United States' voice of ratification.

How important is the issue presented? The Jones Act, 46 U.S.C. App. § 688(a), has long protected seamen: "Any seaman who shall suffer personal injury in the course of his

employment may, at his election, maintain an action for damages at law with the right of trial by jury." Justice Story set the stage in 1823, with these oft-quoted words:

> Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel. . . . But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty. . . . They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them . . . the most rigid scrutiny is instituted into the terms of every contract, in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable. Hence, every deviation from the terms of the common shipping paper (which stand upon the general doctrines of maritime law), is rigidly inspected; and if additional burthens [sic] or sacrifices are imposed upon the seamen without adequate remuneration, the court feels itself authorized to interfere and moderate or annul the stipulation law.

Harden v. Gordon, 11 F. Cas. 480, 483, 485 (No. 6047) (C.C. D. Me. 1823) (Story, Circuit Justice). This Court has said

that "[o]ur historic national policy, both legislative and judicial . . . has generally sought to safeguard seaman's rights" *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246 (1942). *See also Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970); *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

If that historic national policy is to be discarded, it should not occur without review by this Court. The decision below and *Bautista* may be wrong, or they may be right. Either way, a final decision by this Court would be important for seamen and shipowners, and would resolve the unanswered question of whether the national law of the United States means that seamen cannot be compelled to arbitration under the Convention Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 21, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-11681
Non-Argument Calendar

D.C. Docket No. 03-23195-CV-UUB

RUEL D. LATOJA,

Plaintiff-Appellant,

versus

CARNIVAL CORPORATION,
d.b.a. Carnival Cruise Lines Incorporated,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 21, 2005)

Before ANDERSON, BLACK and CARNES, Circuit Judges.

PER CURIAM:

As the appellant, Ruel D. Latoja, candidly concedes, his position in this appeal is squarely foreclosed by our decision

earlier this year in *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005). There is no material distinction between the two cases. Latoja seeks only to preserve his ability to seek certiorari review in the United States Supreme Court, and he has done that.

AFFIRMED.

APPENDIX B —ADMINISTRATIVE ORDER CLOSING CASE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED MARCH 9, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 03-23195-CIV-UNGARO-BENAGES

RUEL D. LATOJA,

Plaintiff,

vs.

CARNIVAL CORPORATION,
d/b/a CARNIVAL CRUISE LINES, INC.,

Defendant.

ADMINISTRATIVE ORDER CLOSING CASE

THIS CAUSE is before the Court *sua sponte.*

THE COURT being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that for administrative purposes this case is hereby CLOSED. It is further

ORDERED AND ADJUDGED that all pending motions are hereby DENIED AS MOOT.

Appendix B

DONE AND ORDERED in Chambers at Miami, Florida, this 9 day of March, 2004.

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DENYING PLAINTIFF'S MOTION TO REMAND DATED MARCH 3, 2004 AND FILED MARCH 4, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 03-23195-CIV-UNGARO-BENAGES

RUEL D. LATOJA,

Plaintiff,

vs.

CARNIVAL CORPORATION,
d/b/a CARNIVAL CRUISE LINES, INC.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DENYING PLAINTIFF'S MOTION TO REMAND

THIS CAUSE is before the Court upon Defendant's Motion to Compel Arbitration, filed December 12, 2003, and Plaintiff's Motion to Remand, filed December 22, 2003.

THE COURT has considered the motions, the pertinent portions of the record, and is otherwise fully advised in the

premises. These motions have been fully briefed,[1] and are now ripe for adjudication.

FACTS

Plaintiff Ruel Latoja is a Philippine citizen and resident who, on or about July 13, 2003, was injured while working as a seaman on board the M/S Paradise, a vessel owned by Defendant Carnival Corporation, a Panamanian corporation. Notice of Removal, at ¶¶ 1, 7; Plaintiff's Complaint at ¶ 4.[2] Plaintiff's complaint seeks damages based on claims for negligence, unseaworthiness and maintenance and cure under the Jones Act, 46 U.S.C. § 688, and the general maritime law of the United States.[3]

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1. A response to, and reply in support of, Defendant's motion to compel have been timely filed. Defendant filed a response to Plaintiff's motion to remand on December 24, 2003, and Plaintiff has not filed a reply in support of its motion to remand.

2. These statements are consistent with the factual allegations contained in Plaintiff's complaint, and Plaintiff does not dispute these statements of fact in the legal memoranda filed in connection with the above motions. Accordingly, the Court accepts for purposes of resolving these motions that Plaintiff is a foreign citizen and Defendant a foreign corporation.

3. The copy of Plaintiff's Complaint filed as an exhibit to Defendant's notice of removal does not include paragraphs twelve and thirteen of Plaintiff's complaint, which apparently allege the factual basis for Plaintiff's claims of negligence and unseaworthiness. However, as the Court concludes that Defendant's motion to compel arbitration shall be granted as a matter of law based on the documentary evidence in the record of Plaintiff's employment relationship with Defendant, there is no need to inquire as to the alleged ways in which Defendant was negligent or in which the M/S Paradise was unseaworthy.

Appendix C

On December 2, 2003, Defendant Carnival Corporation filed a notice of removal pursuant to 28 U.S.C. § 1446(a).[4] As grounds for removal of this complaint, Defendant claims that Plaintiff was injured while employed by Defendant under a contract which includes an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). As a result, argues Defendant, this Court has subject-matter jurisdiction over Plaintiff's action pursuant to 9 U.S.C. § 203,[5] and this action may be removed to federal court pursuant to 28 U.S.C. § 1441(a) and 9 U.S.C. § 205.[6]

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4. Section 1446(a) provides:

> A defendant . . . desiring to remove any civil action . . . from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

5. Section 203 provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy."

6. Section 205 of Title 9 provides:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration

(Cont'd)

Appendix C

Attached to Defendant's notice of removal was a copy of the three-count complaint filed by Plaintiff in the Eleventh Circuit of Miami-Dade County, Florida, General Jurisdiction Division, and served on Defendant on November 6, 2003, Notice of Removal, at Exhibit C. Defendant has also filed a copy of an employment contract executed on February 12, 2003 between Plaintiff and, through agent Maunlad Trans., Inc., Seachest Associates and Defendant Carnival Corporation for an eight-month term of employment aboard the M/S Paradise. *Id.*, at Exhibit A. Attached as Annex A to Plaintiff's employment agreement is a document entitled, "Standard Terms and Conditions Governing the Employment of Filipino Seafarers On-Board Ocean-Going Vessels." Section 29 of this document provides:

> In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction

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(Cont'd)

> agreement or award falling under the Convention, the defendant . . . may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title [i.e., 9 U.S.C. §§ 1-16] any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

> of the voluntary arbitrator or panel of arbitrators. If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the National Labor Relations Commission (NLRC), pursuant to Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 or to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators. If there is no provision as to the voluntary arbitrators to be appointed by the parties, the same shall be appointed from the accredited voluntary arbitrators of the National Conciliation and Mediation Board of the Department of Labor and Employment.

Id. The signature of "Ruel Latoja" appears on pages one and six of this annexed document. *Id.*

LEGAL ANALYSIS

I. Plaintiff's motion to remand

Plaintiff's "motion to remand" consists entirely of the following: "Plaintiff . . . by and through undersigned counsel, adopts and incorporates herein as if fully set forth the following which is attached as Plaintiff's Exhibits 'A', 'B', and 'C', respectively. In support Plaintiff states that the legal issues contained in the instant action are identical to those presented *in Batuista v. Norvegian, et al.* and *Lanzar v. Norwegian, et al.*" These exhibits are legal memoranda filed

by Plaintiff's counsel on behalf of the plaintiffs in consecutively numbered cases 03-21642-Civ-Seitz through 03-21651-Civ-Seitz, collectively "the Seitz cases," filed in the United States District Court for the Southern District of Florida.[7] Furthermore, on December 22, 2003 Plaintiff filed

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7. These cases arose from a May 25, 2003 steam boiler explosion on board the S/S Norway which killed six crewmen and injured four others. Case No. 03-21642-Civ-Seitz, D.E. # 93, at 2. In each, the injured seamen or the personal representatives of the six decedent crew members filed suit against Star Cruises and Norwegian Cruise Line, Ltd. in the Eleventh Circuit of Miami-Dade County, Florida, General Jurisdiction Division, alleging negligence and unseaworthiness and seeking maintenance and cure pursuant to the Jones Act and the general maritime law of the United Suites. *Id.* These cases were removed to the United States District Court for the Southern District of Florida by the defendants on June 17, 2003 pursuant to 28 U.S.C.§ 1446 and 9 U.S.C. § 205, and were subsequently consolidated for pretrial purposes by Judge Seitz because of the similar factual and legal issues involved. Case No. 03-21642-Civ-Seitz, D.E. ## 1, 9.

The plaintiffs filed motions to remand which argued (1) that the defendants' notices of removal to district court failed to include competent evidence of arbitration agreements among the parties; (2) that the alleged arbitration agreements were void and unenforceable and thus did not provide a basis for subject-matter jurisdiction over the plaintiffs' complaints under Title 9; (3) that the plaintiffs could not be bound by the terms of the arbitration agreements because they had no notice of the arbitration provisions and because the employment agreements were executed under conditions of coercion and duress; and (4) that the district court lacked subject-matter jurisdiction over the plaintiffs' complaints because 9 U.S.C. § 1 should be read in conjunction with Chapter 2 of Title 9 to exclude seamen's employment contracts from the reach

(Cont'd)

the transcript of Kjell Hartness in support of his motion for remand and in opposition to Defendants' motion to compel arbitration. Plaintiff has not filed a reply in support of his motion to remand.

The Court has considered Plaintiff's motion and finds Plaintiff's submission factually inapposite and entirely unpersuasive. The defendants in the Seitz cases were corporations Star Cruises and Norwegian Cruise Lines, Ltd. While asserting that the legal issues raised by Plaintiff's "motion" and the motions to remand filed in the Seitz cases are identical, Plaintiff offers no explanation as to why the Court should adopt documentary and testimonial evidence regarding the corporate practices of Star Cruises or Norwegian Cruise Lines, Ltd. as evidence of the conditions under which Plaintiff was hired by Carnival Corporation. Plaintiff has also filed without explanation the deposition testimony of Kjell Hartness, director of Human Resources for Marine Operations with Norwegian Cruise Lines, Ltd. and has filed the deposition testimony of the plaintiffs in the Seitz cases, but has not filed with the Court any testimony from Plaintiff himself regarding the circumstances surrounding his hiring, employment or injury. In addition to

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(Cont'd)

of the Convention. Plaintiff's Motion to Remand, at Exhibit A, at 16-18. Defendants filed cross-motions to compel arbitration pursuant to the terms of the plaintiff's employment agreements, and on October 14, 2003, Judge Seitz entered an order granting the defendants' motions to compel arbitration based on the terms of the plaintiffs' employment contracts and the provisions of the Convention as adopted by the United States in Chapter 2 of Title 9 of the United States Code.

filing no case-specific legal memoranda, Plaintiff has introduced no case-specific evidence in support of his motion to remand. The deficiencies in Plaintiff's submissions become apparent when the Court attempts to import into this case the legal arguments made by the plaintiffs in the Seitz cases.

For example, although the plaintiffs in those cases argued that the notices of removal filed by Defendants Star Cruises and Norwegian Cruise Lines, Ltd. were facially deficient for a variety of reasons, here Plaintiff does not address the fact that Defendant's notice of removal is supported by a copy of the employment agreement between the parties, that this agreement includes a provision regarding dispute settlement procedures which provides for arbitration in the Philippines before the NLRC or before voluntary arbitration panels of all claims arising from Plaintiff's employment, and that the annex in which this provision appears includes the signature of "Ruel Latoja." The Court has considered Defendant's notice of removal and these submissions, and finds that they include an adequate statement of Defendant's grounds for removal to satisfy 28 U.S.C. § 1446(a) and that the documentary evidence of the arbitration agreement between the parties is adequate to support subject-matter jurisdiction over this dispute pursuant to 9 U.S.C. § 205.

Furthermore, although the plaintiffs in the Seitz cases argued that the plaintiffs could not be bound by the terms of the disputed arbitration agreements because they had no notice of the arbitration provisions and because the employment agreements were executed under conditions of coercion and duress, these allegations were supported by

extensive testimonial evidence by the plaintiffs themselves and others familiar with the defendants' crewing practices. In this case, Plaintiff has submitted no testimonial evidence regarding his hiring, the execution of his employment contract or the crewing practices of Defendant Carnival Corporation. Any implicit assertion that Plaintiff was unaware of the arbitration agreement is belied by his signature on the documents in which this agreement appears, and any implicit assertion that this particular agreement was the result of coercion or duress by Defendant is entirely unsupported by the record.

Finally, the plaintiffs in the Seitz cases argued that the district court lacked subject-matter jurisdiction over the plaintiffs' complaints because 9 U.S.C. § 1 should be read in conjunction with Chapter 2 of Title 9 to exclude seamen's employment contracts from the reach of the Convention as adopted under United States law. Because the Convention is the exclusive source of the Court's subject-matter jurisdiction over this dispute, Plaintiff argues, the absence of a cognizable arbitration agreement divests the Court of jurisdiction. While this is a legal argument involving the construction of Title 9 of the United States Code, the Court concludes that seamen employment contracts fall within the terms of Title 9 for the reasons discussed below in connection with Defendant's motion to compel arbitration, and finds that subject-matter jurisdiction over this disputes exists thereby pursuant to 9 U.S.C. § 205.

Although the memoranda filed in the Seitz cases suggest that Plaintiff's counsel and other co-counsel diligently represented those plaintiffs through the preparation of

thorough memoranda and evidentiary submissions, it is equally evident that Plaintiff's counsel has failed entirely to represent this Plaintiff's interests through the filing of the pending motion to remand. Plaintiff's counsel's failure to file a case-specific memorandum in support of Plaintiff's motion to remand and failure to file case-specific evidence of any kind demonstrates a lack of respect for Plaintiff and for this Court. Nonetheless, the Court has attempted to consider the legal arguments presented in the plaintiffs' motions to remand in the Seitz cases and finds that these arguments are entirely unsupported by the evidence in the record. The Court concludes that subject-matter jurisdiction exists over this dispute, and concludes further that this case was properly removed to federal court. For this reason, Plaintiff's motion to remand shall be denied.

II. Defendant's motion to compel arbitration

By comparison to Plaintiff's motion to remand, Defendant has filed a case-specific motion to compel arbitration, supported by a memorandum of law and documentary evidence of the arbitration agreement executed by the parties through Plaintiff's employment contract. Defendant argues that the Court is obliged to compel arbitration according to the terms of this agreement pursuant to 9 U.S.C. § 202. Before considering the merits of this argument, however, the Court addresses the adequacy of Plaintiff's response.

In response to Defendant's motion to compel arbitration, Plaintiff has filed a response which, in its entirety, incorporates the memorandum filed by the plaintiffs in the

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Seitz cases in opposition to the defendants' motions to compel arbitration. Although this memorandum addresses questions of law which are relevant to the issues raised by Defendant's motion to remand, this memorandum is deficient in two respects. First, the memorandum fails to comply with the requirements of Rule 7.1.C.2 of the Local Rules of the United States District Court for the Southern District of Florida, as it exceeds without leave of the Court the page limitation established by that rule. Secondly, the memorandum makes arguments which in large part depend entirely on the record in the cases before Judge Seitz. These arguments relied on the hiring conditions purportedly described in the Seitz plaintiffs' deposition and affidavit testimony, and were specific to the conditions under which these plaintiffs' arbitration agreements with the defendants were executed. It is impossible to apply these arguments to the present dispute, as Plaintiff seems to invite the Court to do, without evidence of the conditions under which Plaintiff was hired by Defendant or the conditions under which the arbitration agreement between the parties was executed, and without evidence of any kind as to the conditions under which this dispute will be submitted to arbitration in the Philippines and the remedies that will be available through such arbitration. Although Plaintiff once again asserts that the memorandum filed in the Seitz cases can be adopted in its entirety as a sufficient response in opposition to Defendant's case-specific motion to compel arbitration, Plaintiff has once again failed to support his position through the introduction of evidence of any kind. For this reason, and because the memorandum on which Plaintiff seeks to reply does not conform with the requirements of Rule 7.1.C.2, the Court finds that striking Plaintiff's response in opposition to

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Defendant's motion to compel arbitration is appropriate under these circumstances. Accordingly, the Court will now proceed to consider the merits of Defendant's motion without considering Plaintiff's response.

Defendant argues that the arbitration agreement contained in Plaintiff's employment agreement is a commercial agreement pursuant to 9 U.S.C. § 202 and arbitration should be compelled pursuant to the terms of the Convention as adopted and enforced by § 201, and the Court concludes that arbitration is appropriate under these circumstances.

The United States Supreme Court has held that "the emphatic federal policy in favor of arbitral dispute resolution. . . . applies with special force in the file of international commerce," as shown by the adoption of the Convention's provisions through the amendment of the Federal Arbitration Act in 1970. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). The Court explained further that this policy is sufficiently compelling that arbitration should be compelled according to the terms of international arbitration agreements "even assuming a contrary result would be forthcoming in a domestic context. *Id.* at 629. Accordingly, the Convention as adopted by Chapter 2 of Title 9 of the United States Code "'contemplates a very limited inquiry by courts when considering a motion to compel arbitration,' and that the court should compel arbitration if (1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for the arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal

relationship, and (4) a party to the agreement is not an American citizen." *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002) (quoting *Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Company*, 767 F.2d 1140, 1144-45 (5th Cir. 1985)). Applying these factors to the limited evidentiary record before the Court, the undersigned concludes that this dispute should be submitted to arbitration pursuant to the terms of the parties' employment contract. Disposing quickly of the second and fourth prongs announced in *Francisco*, the Court finds based on the undisputed record in this case that the terms of the arbitration provision included in the parties' employment contract provide for arbitration in the Philippines, a signatory to the Convention, 9 U.S.C. § 201, and that Plaintiff is a citizen of the Philippines and Defendant is a Panamanian corporation.

Returning to the first prong of the *Francisco* analysis, the Court concludes that the record demonstrates that the parties have executed an arbitration agreement which applies to all claims raised by Plaintiff's complaint. Section 29 of the document annexed to Plaintiff's employment contract—and signed separately by Plaintiff—provides for alternative arbitration schemes for all claims and disputes arising from the terms of the contract. As Defendant points out, the terms of Plaintiff's employment contract address directly the subject-matter of Plaintiff's claims for negligence, unseaworthiness and maintenance and cure in §§ 1.A.3, "Duties of Employer/Agency/ Master," and 20.B, "Compensation and Benefits for Illness or Injury." The parties employment contract thus provides for the arbitration of all claims included in Plaintiff's complaint, and this factor favors compulsory arbitration of these claims.

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The third and final prong also favors arbitration of these claims as the case law addressing this factor holds squarely that employment contracts such as the one between the parties are commercial relationships for purposes of the Convention. The Supreme Court has explained that employment contracts may be commercial relationships within the meaning of Title 9 of the United States Code, *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001), and the Fifth Circuit, after consideration of the language of the Convention and 9 U.S.C. §§ 201 and 202, has concluded specifically that seamen employment contracts are commercial relationships for purposes of the Convention, *Francisco*, 293 F.3d at 274-75. The Court therefore concludes that the parties' employment contract, which includes the relevant arbitration agreement, established a commercial relationship between Plaintiff and Defendant.

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CONCLUSION

For these reasons, the Court concludes that subject-matter jurisdiction exists over this dispute pursuant to Chapter 2 of Title 9 of the United States Code, and that Defendant has properly removed this cause to federal court. Furthermore, the Court finds that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as incorporated through Title 9, compels arbitration of the claims raised in Plaintiff's complaint pursuant to the terms of the arbitration agreement executed by the parties. Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion to Remand is DENIED. It is further

ORDERED AND ADJUDGED that Defendant's Motion to Compel Arbitration is GRANTED.

DONE AND ORDERED in Chambers, Miami, Florida, this 3 day of March, 2004.

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN *BAUTISTA, et al. v. STAR CRUISES, et al.* FILED JANUARY 18, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-15884

D.C. Docket Nos. 03-21642-CV-PAS; 03-21643-CV-PAS; 03-21644-CV-PAS; 03-21645-CV-PAS; 03-21646-CV-PAS; 03-21647-CV-PAS; 03-21648-CV-PAS; 03-21649-CV-PAS; 03-21650-CV-PAS; 03-21651-CV-PAS

RIZALYN BAUTISTA, Individually and as Personal Representative of the Estate of Mari-John Bautista, and all claiming by and through her,

Plaintiff-Appellant,

versus

STAR CRUISES, NORWEGIAN CRUISE LINE, LTD.,

Defendants-Appellees.

PAUL PERALTA,

Plaintiff-Appellant,

versus

STAR CRUISES, NORWEGIAN CRUISE LINE, LTD.,

Defendants-Appellees.

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RAYMOND LOVINO,

Plaintiff-Appellant,

versus

STAR CRUISES, NORWEGIAN CRUISE LINE, LTD.,

Defendants-Appellees.

RONALDO MARCELINO,

Plaintiff-Appellant,

versus

STAR CRUISES, NORWEGIAN CRUISE LINE, LTD.,

Defendants-Appellees.

ROLANDO TEJERO,

Plaintiff-Appellant,

versus

STAR CRUISES, NORWEGIAN CRUISE LINE, LTD.,

Defendants-Appellees.

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ABDI COMEDIA,

Plaintiff-Appellant,

versus

STAR CRUISES, NORWEGIAN CRUISE LINE, LTD.,

Defendants-Appellees.

CRISTINA L. VALENZUELA, Individually and as Personal Representative of the Estate of Candido S. Valenzuela, Jr. and all those claiming through her,

Plaintiff-Appellant,

versus

STAR CRUISES, NORWEGIAN CRUISE LINE, LTD.,

Defendants-Appellees.

MARILEN S. BERNAL, Individually and as Personal Representative of the Estate of Ramil G. Bernal, and all those claiming by and through her,

Plaintiff-Appellant,

versus

STAR CRUISES, NORWEGIAN CRUISE LINE, LTD.,

Defendants-Appellees.

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WILLY I. VILLANUEVA, Individually and as Personal Representative of the Estate of Rene Villanueva, and all those claiming through him,

Plaintiff-Appellant,

versus

STAR CRUISES, NORWEGIAN CRUISE LINE, LTD.,

Defendants-Appellees.

MARIA GARCIA L. ROSAL, Individually and as Personal Representative of the Estate of Ricardo B. Rosal, III, and all those claiming by and through her,

Plaintiff-Appellant,

versus

STAR CRUISES, NORWEGIAN CRUISE LINE, LTD.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida.

(January 18, 2005)

Appendix D

Before EDMONDSON, Chief Judge, WILSON, Circuit Judge, and RESTANI*, Judge.

RESTANI, Chief Judge:

The S/S NORWAY's steam boiler exploded on May 25, 2003, while the cruise ship was in the Port of Miami. Six of the crewmembers represented in this action were killed and four were injured.[1] Each crewmember's employment agreement with Defendant NCL includes an arbitration clause, which the district court enforced pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "Convention"), and its implementing legislation, 9 U.S.C. §§ 202-208 (2002) (the "Convention Act"). *See Bautista v. Star Cruises*, 286 F.Supp.2d 1352 (S.D.Fla.2003). Plaintiffs' appeal presents an issue of first impression in this Circuit: whether the crewmembers' employment agreements were shielded from arbitration by the seamen employment contract exemption contained in section 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16

* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

1. The injured crewmembers are plaintiff-appellants in this case along with personal representatives of the decedents. In the interest of precision, this opinion refers to plaintiff-appellants collectively as "Plaintiffs," and refers to the injured and deceased crewmembers collectively as "crewmembers" when discussing those who were employed by NCL.

(2002) (the "FAA").[2] Because the FAA seamen exemption does not apply and the district court had jurisdiction to compel arbitration, we affirm.

BACKGROUND

I. THE SUITS AGAINST STAR CRUISES AND NCL

Following the explosion aboard the NORWAY, Plaintiffs filed separate but nearly identical suits in Florida circuit court against Defendant-Appellee NCL, owner of the NORWAY, and Defendant-Appellee Star Cruises, alleged by Plaintiffs to be the parent company of NCL. The complaints sought damages for negligence and unseaworthiness under the Jones Act, 46 U.S.C.App. § 688, and for failure to provide maintenance, cure and unearned wages under the general maritime law of the United States.

NCL removed the ten cases to federal district court pursuant to section 205 of the Convention Act, which permits removal before the start of trial when the dispute relates to an arbitration agreement or arbitral award covered by the Convention. *See* 9 U.S.C. § 205.[3] In the notices of removal

2. This opinion uses "FAA" to refer to the statute contained in chapter 1 of title 9 and "Convention Act" to refer to chapter 2 of title 9. Courts often refer to the entirety of title 9 as the Federal Arbitration Act. *See, e.g., Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir.1998). As demonstrated in the Part I of the discussion below, however, the relationship between the two statutes is determined by their terms rather than nomenclature.

3. After removal to federal district court, the ten cases were consolidated for pretrial purposes on July 14, 2003. *Bautista*, 286 F.Supp.2d at 1355 n. 1.

filed with the district court, NCL described how the crewmembers were bound by employment agreements that include an arbitration provision covered by the Convention.

II. THE CREWMEMBERS' EMPLOYMENT AGREEMENTS INCORPORATE AN ARBITRATION PROVISION

At the time of the explosion, each crewmember's employment was governed by the terms of a standard employment contract executed by the crewmembers and representatives of NCL in the Philippines between August 2002 and March 2003. The Philippine government regulated the form and content of such employment contracts, as well as other aspects of the seamen hiring process, through a program administered by the Philippine Overseas Employment Administration ("POEA"), a division of the Department of Labor and Employment of the Republic of the Philippines ("DOLE").

Each crewmember signed a one-page standard employment agreement created by the POEA, with some variations according to the position for which the crewmember was hired. Each agreement sets forth the basic terms and conditions of the crewmember's employment, including the duration of the contract, the position accepted, and the monthly salary and hours of work. Additional terms and conditions are incorporated by reference: Paragraph 2 provides that the contract's terms and conditions shall be observed in accordance with POEA Department Order No. 4 and POEA Memorandum Circular No. 9. Department Order No. 4, in turn, incorporates the document containing the

arbitration clause: The Standard Terms and Conditions Governing the Employment of Filipino Seafarers On Board Ocean-Going Vessels (the "Standard Terms").[4] Section 29 of the Standard Terms requires arbitration "in cases of claims and disputes arising from [the seaman's] employment," through submission of the claims to the National Labor Relations Commission ("NLRC"), voluntary arbitrators, or a panel of arbitrators. Standard Terms, sec. 29; R.3.60, p. 1.[5]

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4. The employment agreements refer explicitly to the Standard Terms in paragraph 3.

5. The full text of Section 29 of the Standard Terms follows:

> In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators. If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the National Labor Relations Commission (NLRC), pursuant to Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 or to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators. If there is no provision as to the voluntary arbitrators to be appointed by the parties, the same shall be appointed from the accredited voluntary arbitrators of the National Conciliation and Mediation Board of the Department of Labor and Employment.

Standard Terms, sec. 29; R.3.60, p. 1.

A POEA official verified and approved the execution of the employment contract by the crewmembers and NCL representatives. Although Plaintiffs dispute that the crewmembers saw the arbitration provision or had it explained to them, *see* Pls.' Mot. for Remand, Exs. 1-8, copies of the Standard Terms provided to the district court by NCL indicate the crewmembers initialed or signed the Standard Terms. *See* Defs.' Resp. to Pls.' Mot. for Remand, Exs. D-F; R-3-60. NCL also provided affidavits from managers at various manning agencies licensed by the POEA to recruit seamen. In the affidavits, the managers attest that (1) they explained the employment documents to the seamen in their native language; (2) the seamen had an opportunity to review the documents; and (3) the seamen were required to attend a Pre-Departure Orientation Seminar for seamen, which was conducted in both the English and Filipino languages and which reviewed, among other subjects, the Standard Terms and the dispute settlement procedures provided for in the employment contract. *Id.* at Exs. C-F; R-3-60.

III. THE DISTRICT COURT COMPELS ARBITRATION

In an order issued on October 14, 2003, the district court granted NCL's motion to compel arbitration and denied Plaintiffs' motion to remand the case to state court. In disposing of the case, the district court ordered that the parties submit to arbitration in the Philippines pursuant to Section 29 of the Standard Terms and retained jurisdiction to enforce or confirm any resulting arbitral award. Plaintiffs appeal.

Appendix D

JURISDICTION

A case covered by the Convention confers federal subject matter jurisdiction upon a district court because such a case is "deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203. Defendants removed these cases from state court pursuant to 9 U.S.C. § 205, which permits removal of disputes relating to arbitration agreements covered by the Convention. *See, e.g.*, Notice of Removal, R1-1-3. Plaintiffs claim that this case is not covered by the Convention, and thereby challenge the district court's jurisdiction. We discuss this challenge below. Assuming the district court exercised jurisdiction appropriately, its order is final and appealable because, by compelling arbitration of the dispute, it "dispos[ed] of all the issues framed by the litigation and [left] nothing for the district court to do but execute the judgment." *See Employers Ins. v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1321 (11th Cir.2001).[6]

STANDARD OF REVIEW

We review *de novo* the district court's order to compel arbitration. *Employers Ins.*, 251 F.3d at 1321.

DISCUSSION

In deciding a motion to compel arbitration under the Convention Act, a court conducts "a very limited inquiry." *Francisco v. Stolt Achievement Mt.*, 293 F.3d 270, 273 (5th Cir.2002), *cert. denied*, 537 U.S. 1030, 123 S.Ct. 561, 154

6. We certified the appealability of this action prior to oral argument. Order (11th Cir. Mar. 2, 2004).

L.Ed.2d 445 (2002); *DiMercurio v. Sphere Drake Ins.' PLC*, 202 F.3d 71, 74 (1st Cir.2000); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186 (1st Cir.1982). A district court must order arbitration unless (1) the four jurisdictional prerequisites are not met, *Std. Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir.2003);[7] or (2) one of the Convention's affirmative defenses applies. *DiMercurio*, 202 F.3d at 79; *see also Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n.3 (11th Cir.2004) ("jurisdictional prerequisites to an action confirming an award are different from the several affirmative defenses to confirmation").

Two jurisdictional prerequisites are at issue here. First, we must determine whether the arbitration agreement arises out of a commercial legal relationship. Second, we ask whether there exists an "agreement in writing" to arbitrate the matter in dispute. Lastly, we consider Plaintiffs' purported affirmative defenses that the arbitration provision is unconscionable under U.S. law and incapable of being arbitrated under the law of the Philippines. In analyzing these arguments, we are mindful that the Convention Act "generally

7. These four require that (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states. *Std. Bent Glass Corp.*, 333 F.3d at 449. It is beyond dispute that the second and fourth conditions are fulfilled in this case. The crewmembers' arbitration provisions provide for arbitration in the Philippines, a signatory of the Convention. The crewmembers are not American citizens, but are citizens of the Philippines.

establishes a strong presumption in favor of arbitration of international commercial disputes." *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir.1998) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40, 105 S.Ct. 3346, 3359-61, 87 L.Ed.2d 444 (1985)). Plaintiffs' arguments fail.

I. PLAINTIFFS' EMPLOYMENT CONTRACTS ARE COMMERCIAL LEGAL RELATIONSHIPS UNDER THE CONVENTION ACT, REGARDLESS OF THE FAA SEAMEN EXEMPTION

We have yet to determine whether the FAA exemption for seamen's employment contracts applies to arbitration agreements covered by the Convention Act.[8] The district court

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8. The seamen employment contract exemption appears in section 1 of the FAA:

> § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title
>
> [. . .] "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but *nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.*

9 U.S.C. § 1 (emphasis added).

determined that it does not. This conclusion is consistent with that of the Fifth Circuit—the only court of appeals to decide this issue—and several district courts. *See Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327 (5th Cir.2004); *Francisco v. Stolt Achievement Mt*, 293 F.3d 270 (5th Cir.2002), *cert. denied*, 537 U.S. 1030, 123 S.Ct. 561, 154 L.Ed.2d 445 (2002); *Acosta v. Norwegian Cruise Line, Ltd.*, 303 F.Supp.2d 1327 (S.D.Fla.2003); *Adolfo v. Carnival Corp.*, No. 02-23672 , 2003 U.S. Dist. LEXIS 24143 (S.D.Fla. Mar. 7, 2003); *Amon v. Norwegian Cruise Lines, Ltd.*, No. 02-21025, 2002 U.S. Dist. LEXIS 27064 (S.D.Fla. Sept. 26, 2002).

As we take up this issue of statutory interpretation, the first step is to determine whether the statutory language has a plain and unambiguous meaning by referring to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 846, 136 L.Ed.2d 808 (1997). The inquiry ceases if the language is clear and "the statutory scheme is coherent and consistent." *Id.* at 340, 117 S.Ct. 843 (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989)). Such is the case here. The statutory framework of title 9 and the language and context of the Convention Act preclude the application of the FAA seamen's exemption, either directly as an integral part of the Convention Act or residually as a non-conflicting provision of the FAA.

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A. The FAA Seamen Exemption Does Not Apply to the Convention Act Directly

1. Overview of the Convention and the Convention Act

The Convention requires that a Contracting State "shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen . . . between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Convention, art. II(1).[9] When the United States acceded to the Convention in

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9. The full text of Article II provides as follows:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Convention, art. II.

1970, it exercised its right to limit the Convention's application to commercial legal relationships as defined by the law of the United States:

> The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States.

Convention, n. 29.[10] Plaintiffs assert that the United States national law definition of "commercial" resides in section 1 of the FAA, which defines "commerce" and provides that "nothing herein contained shall apply to contracts of employment of seamen." 9 U.S.C. § 1. Although section 1 clearly exempts seamen's employment contracts from the FAA, *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 121 S.Ct. 1302, 1306, 149 L.Ed.2d 234 (2001), the exemption's application outside the FAA is restricted by the second and third chapters of title 9.

2. The Statutory Framework of Title 9 of the United States Code

The three chapters of title 9 are closely interrelated, but, contrary to Plaintiffs' argument, they are not a seamless whole. As indicated, the FAA and the Convention Act

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10. Article I(3) of the Convention permits any State party to apply the Convention "only to the differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." Convention, art. I(3).

comprise Chapter 1 and Chapter 2, respectively. Chapter 3 contains the legislation implementing the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 (entered into force June 16, 1976). 9 U.S.C. § § 301-307 (the "Inter-American Act"). Within the general field of arbitration, each act has a specific context and purpose. Congress, as it added the Convention Act and then the Inter-American Act to title 9, anticipated conflicts among these treaty-implementing statutes and the FAA. Congress addressed potential conflicts in two ways, each of which limits the degree to which title 9 may be considered a single statute.

The first is general in nature. The FAA applies residually to supplement the provisions of the Convention Act and the Inter-American Act. Rather than put the Convention Act and the Inter-American Act on equal footing with the FAA in the field of foreign arbitration, Congress gave the treaty-implementing statutes primacy in their fields, with FAA provisions applying only where they did not conflict. *See* 9 U.S.C. § 208 (the Convention Act residual provision); 9 U.S.C. § 307 (the Inter-American Act residual provision). This hierarchical structure accords with our understanding that, "[a]s an exercise of the Congress' treaty power and as federal law, 'the Convention must be enforced according to its terms over all prior inconsistent rules of law.'" *Indus. Risk Insurers,* 141 F.3d at 1440 (quoting *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir.1985)).

The second technique for reconciling title 9's chapters is more specific. Certain provisions of the Convention Act

and the Inter-American Act refer explicitly to specific sections of other chapters of title 9. Section 302 of the Inter-American Act, for example, directly incorporates several sections of the Convention Act: "[s]ections 202, 203, 204, 205, and 207 of this title shall apply to this chapter [9 U.S.C. § § 301-307] as if specifically set forth herein." 9 U.S.C. § 302. Most relevant for the instant case is the reference in section 202 of the Convention Act to section 2 of the FAA.

3. Section 202 of the Convention Act

In contrast to the Inter-American Act's direct incorporation of several Convention Act sections, section 202 does not incorporate section 2 of the FAA as an exhaustive description of the Convention Act's scope. Rather, section 202 uses section 2 as an illustration of the types of agreements covered by the Convention Act.

In articulating the Convention's commercial scope under the laws of the United States, section 202 of the Convention Act provides that an agreement falls under the Convention if it "aris[es] out of a legal relationship, whether contractual or not, which is considered as commercial, *including* a transaction, contract, or agreement described in section 2 of this title [9 U.S.C. § 2]." 9 U.S.C. § 202 (emphasis added).[11]

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11. The full text of § 202 is as follows:

§ 202 Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction,

(Cont'd)

Section 2 of the FAA makes valid and enforceable "[a] written provision in any maritime transaction or *a contract evidencing a transaction involving commerce* to settle by arbitration." 9 U.S.C. § 2 (emphasis added).

The Convention Act's reference to section 2 does not indicate an intent to limit the definition of "commercial" to those described in section 2 of the FAA as modified by section 1; the expansive term "including" would be superfluous if the FAA provided the full and complete definition. "Including" demonstrates that, at the very least, Congress meant for "commercial" legal relationships to consist of contracts evidencing a commercial transaction, as listed in section 2, *as well as* similar agreements. *See Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100, 62 S.Ct. 1, 4, 86 L.Ed. 65 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir.1968) ("The word

(Cont'd)

> contract, or agreement described in section 2 of this title [9 U.S.C. § 2], falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202.

'includes' is usually a term of enlargement, and not of limitation. . . . It therefore conveys the conclusion that there are other items includable, though not specifically enumerated by the statutes.").

We therefore understand the reference to section 2 of the FAA to be generally illustrative of the commercial legal relationships covered by section 202. The illustration rendered by section 2 includes employment agreements and makes no mention of the section 1 seamen exemption. *Cf. Circuit City Stores,* 532 U.S. at 113, 121 S.Ct. at 1308 (construing section 2 and rejecting the proposition that an employment contract is not a "contract evidencing a transaction involving interstate commerce"). Accordingly, the terms of the Convention Act do not provide that we read section 1 into section 202.[12]

Plaintiffs cite committee testimony in the legislative history in the hope of demonstrating that Congress intended section 202 of the Convention Act to incorporate the FAA seamen exemption. Ambassador Richard Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, testified before the Senate Foreign Relations Committee that

> the definition of commerce contained in section 1 of the original Arbitration Act is the national

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12. Plaintiffs emphasize that the heading to Section 1 of the FAA reads "exceptions to title." A section heading may be helpful in construing a statute's meaning, but "it may not be used as a means of creating an ambiguity when the body of the act itself is clear." 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47:07 (6th ed.2000). The Convention Act is clear.

> law definition for the purposes of the declaration. A specific reference, however, is made in section 202 to section 2 of title 9; which is the basic provision of the original Arbitration Act.

S. Comm. on Foreign Relations, Foreign Arbitral Awards, S.Rep. No. 91-702, at 6 (1970). Although it is plausible to infer from Ambassador Kearney's comments that he believed the section 1 exemptions should apply to the Convention Act, his views as a single State Department official are a relatively unreliable indicator of statutory intent. *See Circuit City Stores*, 532 U.S. at 120, 121 S.Ct. at 1311 ("Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress."); *Francisco*, 293 F.3d at 276 (quoting *Circuit City Stores* to discount Ambassador Kearney's testimony). Plaintiffs nevertheless claim that, according to *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), his views are entitled to "great deference." Pls.' Op. Br. at 27. *Udall*, however, accords such deference only to "the officers or agency charged with [the statute's] administration," 380 U.S. at 16, 85 S.Ct. at 801, and there is no indication that the State Department is so charged. Even if the above testimony were owed some deference, it could not alter the plain terms of the Convention Act. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457, 122 S.Ct. 941, 954, 151 L.Ed.2d 908 (2002) ("Floor statements from two Senators cannot amend the clear and unambiguous language of a statute."). Rather than directly incorporate an FAA provision that Congress did not, we adhere to the framework Congress provided and evaluate the applicability of an unmentioned FAA section according to the Convention Act's residual application provision.

B. The FAA Seamen Exemption Does Not Apply Residually

As noted above, section 208 of the Convention Act provides that non-conflicting provisions of the Arbitration Act apply residually to Convention Act cases:

> Chapter 1 [9 U.S.C. § § 1 *et seq.*] applies to actions and proceedings brought under this chapter [9 U.S.C. § § 201 *et seq.*] *to the extent that chapter is not in conflict* with this chapter [9 U.S.C. §§ 201 *et seq.*] or the Convention as ratified by the United States.

9 U.S.C. § 208 (emphasis added); *cf.* 9 U.S.C. § 307 (providing for residual application of the FAA to the Inter-American Act). Under this residual provision, the issue is whether the FAA seamen exemption conflicts with the Convention Act or the Convention as ratified by the United States.

A conflict exists between the FAA seamen exemption, which is narrow and specific, and the language of the Convention and the Convention Act, which is broad and generic. Plaintiffs, under the impression that an FAA term may only be contradicted by name, argue that no conflict exists because section 202 of the Convention Act is silent as to seamen's employment contracts. According to this logic, a statutory provision pertaining to persons above the age of eighteen would not conflict with a provision that exempts thirty year-olds. Because the Convention Act covers commercial legal relationships without exception, it conflicts

with section 1, an FAA provision that exempts certain employment agreements that—but for the exemption—would be commercial legal relationships. The Fifth Circuit came to the same conclusion in *Francisco*:

> In short, the language of the Convention, the ratifying language, and the Convention Act implementing the Convention do not recognize an exception for seamen employment contracts. On the contrary, they recognize that the only limitation on the type of legal relationship falling under the Convention is that it must be considered "commercial," and we conclude that an employment contract is "commercial."

293 F.3d at 274. We see no reason to diverge from the sensible reasoning of our sister Circuit.

Indeed, to read industry-specific exceptions into the broad language of the Convention Act would be to hinder the Convention's purpose:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S.506, 520 n.15, 94 S.Ct. 2449, 2457 n.15, 41 L.Ed.2d 270 (1974) (emphasis added);

see also Indus. Risk Insurers, 141 F.3d at 1440 (identifying additional purposes of the Convention, such as relieving congestion in the courts and providing an expedient alternative to litigation). In pursuing effective, unified arbitration standards, the Convention's framers understood that the benefits of the treaty would be undermined if domestic courts were to inject their "parochial" values into the regime:

> In their discussion of [Article II(1)], the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.

Scherk, 417 U.S. at 520 n. 15, 94 S.Ct. at 2457 n. 15. This concern is addressed by the broad language of section 202 of the Convention Act. Considering the language of the Convention Act in the context of the framework of title 9 and the purposes of the Convention, we find no justification for removing from the Convention Act's scope a subset of commercial employment agreements. The crewmembers' arbitration provisions constitute commercial legal relationships within the meaning of the Convention Act.

Appendix D

II. PLAINTIFFS' EMPLOYMENT AGREEMENTS WERE AGREEMENTS IN WRITING, WHICH VESTED THE JURISDICTION OF THE DISTRICT COURT

Finding no error in the district court's determination that instant arbitration provisions are commercial legal relationships, we turn to the other relevant jurisdictional prerequisite, i.e., that the party seeking arbitration provide "an agreement in writing" in which the parties undertake to submit the dispute to arbitration. Convention, art. II(1); *see also Czarina*, 358 F.3d at 1291. Agreements in writing include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Convention, art. II(2).

NCL supplied the district court with copies of the employment agreement and the Standard Terms signed by each crewmember. *See* Defs.' Resp. to Pls.' Mot. for Remand, Exs. D-F; R-3-60. Although Plaintiffs claim the crewmembers did not have an opportunity to review the entirety of the Standard Terms before signing, Plaintiffs do not dispute the veracity of the signatures. *See* Pls.' Op. Br. at 36 n.1. Accordingly, this documentation fulfills the jurisdictional prerequisite that the court be provided with an agreement to arbitrate signed by the parties. Plaintiffs try in vain to identify three reasons why the signed documents fail to constitute agreements in writing.

First, Plaintiffs impugn the incorporation of the Standard Terms into the employment agreement, citing decisions of other Circuits that interpret Article II(2) to require inclusion

of an arbitration provision in a signed agreement or an exchange of letters or telegrams. *See Std. Bent Glass,* 333 F.3d at 449; *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.,* 186 F.3d 210, 218 (2d Cir.1999); *cf. United States Fidelity & Guar. Co. v. West Point Constr. Co.,* 837 F.2d 1507, 1508 (11th Cir.1988) (finding that, under the FAA, the incorporation of an arbitration provision expressed an intent of the parties to arbitrate). This argument fails to address the fact that the crewmembers signed the Standard Terms, the document containing the arbitration provision.

Second, Plaintiffs assert that, in order to satisfy the agreement-in-writing requirement, NCL bears an "evidentiary burden" of establishing that the crewmembers knowingly agreed to arbitrate disputes arising from the employment relationship. *See* Pls.' Op. Br. at 42. The parties disagree as to whether the crewmembers were specifically notified of the arbitration provision, and each side supports its position with affidavits. *See* Pls.' Mot. for Remand, Exs. 1-8; Defs.' Resp. to Pls.' Mot. for Remand, Exs. C-F; R-3- 60. Plaintiffs also emphasize the general solicitude for seamen reflected in the Jones Act and *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 243-44, 63 S.Ct. 246, 249-50, 87 L.Ed. 239 (1942). Plaintiffs, however, offer no authority indicating that the Convention or the Convention Act impose upon the party seeking arbitration the burden of demonstrating notice or knowledgeable consent. To require such an evidentiary showing in every case would be to make an unfounded inference from the terms of the Convention and would be squarely at odds with a court's limited jurisdictional inquiry, an inquiry colored by a strong preference for arbitration. *See Francisco,* 293 F.3d at 273. It is no better to style

Plaintiffs' defective notice claim as an affirmative defense, as virtually every case would be susceptible to a dispute over whether the party resisting arbitration was aware of the arbitration provision when the party signed the agreement. In the limited jurisdictional inquiry prescribed by the Convention Act, we find it especially appropriate to abide by the general principle that "[o]ne who has executed a written contract and is ignorant of its contents cannot set up that ignorance to avoid the obligation absent fraud and misrepresentation." *Vulcan Painters v. MCI Constructors,* 41 F.3d 1457, 1461 (11th Cir.1995).

Third, Plaintiffs' argue that the agreement-in-writing prerequisite remains unfulfilled because NCL did not attach the signed copies of the Standard Terms to its notices of removal to the district court. NCL was under no such obligation. The agreement-in-writing prerequisite does not specify when a party seeking arbitration must provide the court with the agreement in writing. The Convention Act's removal provision states that "[t]he procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal." 9 U.S.C. § 205. Section 205 does not require a district court to review the putative arbitration agreement—or investigate the validity of the signatures thereon— before assuming jurisdiction: "The language of § 205 strongly suggests that Congress intended that district courts continue to be able to assess their jurisdiction from the pleadings alone." *Beiser v. Weyler,* 284 F.3d 665, 671 (5th Cir.2002); *cf.* 28 U.S.C. § 1446 (requiring only "a short and plain statement of the grounds for removal"). NCL's

notices of removal met procedural requirements by identifying the relevant documents and describing how they bind the Plaintiffs to arbitration. *See, e.g.*, R1-1-3; *see also Whole Health Chiropractic & Wellness, Inc. v. Humana Medical Plan, Inc.*, 254 F.3d 1317, 1321 (11th Cir.2001) ("The law disfavors court meddling with removals based upon procedural—as distinguished from jurisdictional—defects").

III. PLAINTIFFS' AFFIRMATIVE DEFENSES FAIL

The Convention requires that courts enforce an agreement to arbitrate unless the agreement is "null and void, inoperative or incapable of being performed." Convention, art. II(3). Plaintiffs do not articulate their defenses in these terms, claiming instead that the arbitration provision is unconscionable and the underlying dispute is not arbitrable. For purposes of analysis, we style the former as a "null and void" claim and the latter as an "incapable of being performed" claim.

A. The Arbitration Provision Is Not Null and Void

"[T]he Convention's 'null and void' clause . . . limits the bases upon which an international arbitration agreement may be challenged to standard breach-of-contract defenses." *DiMercurio v. Sphere Drake Ins. PLC*, 202 F.3d 71, 79 (1st Cir.2000). The limited scope of the Convention's null and void clause "must be interpreted to encompass only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale." *Id.* at 80.

Appendix D

Plaintiffs do not claim fraud, mistake, duress or waiver. Instead, Plaintiffs, allege that the crewmembers were put in a difficult "take it or leave it" situation when presented with the terms of employment. *See Pl's Op. Br.* at 43. Plaintiffs argue that state-law principles of unconscionability render the resulting agreements unconscionable. They support this position by citing the Supreme Court's opinion in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985 (1995) ("courts generally . . . should apply ordinary state-law principles that govern the formation of contracts"). In *Kaplan*, however, the Court applied the FAA, not the Convention. *See id.*, 514 U.S. at 941, 115 S.Ct. at 1922. Domestic defenses to arbitration are transferrable to a Convention Act case only if they fit within the limited scope of defenses described above. Such an approach is required by the unique circumstances of foreign arbitration:

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629, 105 S.Ct. 3346, 3355, 87 L.Ed.2d 444 (1985).

While it is plausible that economic hardship might make a prospective Filipino seaman susceptible to a hard bargain during the hiring process, Plaintiffs have not explained how this makes for a defense under the Convention. It is doubtful that there exists a precise, universal definition of the unequal bargaining power defense that may be applied effectively across the range of countries that are parties to the Convention, and absent any indication to the contrary, we decline to formulate one.[13]

B. The Arbitration Provision is Not Incapable of Being Performed

Plaintiffs argue that, under the law of the Philippines, the seamen's claims are not considered "claims arising from this employment" pursuant to Section 29 of the Standard Terms and therefore are not subject to arbitration in that country. To support this claim, Plaintiffs rely on *Tolosa v. N.L.R.C.* (2003) G.R. No. 149578 (Phil.). *Tolosa* involved a claim against a deceased seaman's employer for the grossly negligent acts of his shipmates when the he fell ill. *Id.* at 6. Because the complaint focused primarily on the tortious conduct of the shipmates rather than a claim "arising from employer-employee relations," the Philippine Supreme Court

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13. This is not to say that the crewmembers were at the complete mercy of NCL. As noted above, the government of the Philippines, through the POEA, regulated the hiring process with the stated purpose of protecting the interests of seamen. Because we decide this case on other grounds, we do not reach Defendants' argument that the involvement of the POEA in the hiring process implicates the Act of State doctrine or concerns of international comity. *See* Defs.' Br. at 11-13.

held that neither the labor arbiter nor the national labor relations body had jurisdiction. *Id.*

Here, a similar result is not foreordained. Plaintiffs have options beyond tort claims; they complain that NCL failed in one of its central duties as an employer and shipowner, i.e., to provide a seaworthy vessel. Accordingly, the holding in *Tolosa* is an insufficient basis from which to conclude that this dispute cannot be arbitrated in the Philippines.

CONCLUSION

The district court properly granted NCL's motion to compel arbitration. The plain language of the Convention Act, 9 U.S.C. §§ 201-208, precludes application of the exemption for seamen's employment agreements set forth in 9 U.S.C. § 1, and there are no impediments to the district court's jurisdiction to compel arbitration. Furthermore, the agreement to arbitrate is not null and void or incapable of being performed.

AFFIRMED.

No. 05-662

In the Supreme Court of the United States

RUEL D. LATOJA,

Petitioner,

v.

CARNIVAL CORPORATION d/b/a
CARNIVAL CRUISE LINES, INC.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May non-U.S. seamen whose claims are governed by the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, codified at 9 U.S.C. §§ 201-208, avoid arbitration by invoking the exception provided for domestic transportation workers by § 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

STATEMENT REGARDING REFERENCES

Respondent/Appellee "Carnival Corporation, d/b/a Carnival Cruise Lines, Inc." refers to itself as "Respondent" or "Carnival". Respondent refers to Petitioner/Appellant as "Petitioner" or "Latoja." Respondent cites to Petitioner's "Petition for a Writ of Certiorari" as "*Pet.Brief* at __".

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SUPPLEMENTAL STATUTORY PROVISIONS

9 U.S.C. § 2 Validity, irrevocability, and enforcement of agreements to arbitrate

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 201. Enforcement of Convention

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter [9 U.S.C. §§ 201 et seq.].

Article II, International Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Reprinted following 9 U.S.C. § 201)

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

46 U.S.C. § 10313(i) Wages

* * *

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

I. STATEMENT OF THE CASE

Ruel Latoja, a Filipino seaman, filed a complaint in the state court in Miami-Dade County, Florida, against Carnival, his employer, for damages for back injuries he allegedly suffered at sea. Latoja asserted causes of action for negligence, unseaworthiness, and failure to provide maintenance and cure under the Jones Act (46 U.S.C. App. § 688(a)) and the general maritime law of the United States.

Carnival removed the case to the United States District Court, Southern District of Florida pursuant to 28 U.S.C. § 1441, et seq. and 9 U.S.C. § 205. Latoja filed a Motion to

Remand to state court, adopting the arguments made in *Bautista v. Star Cruises*, a similar seamen's case in the Southern District of Florida. In turn, Carnival filed a Motion to Compel Arbitration in the Philippines, invoking the provisions of a Philippine Overseas Employment Administration (POEA) Contract of Employment, signed by Latoja, which incorporates the dispute resolution and arbitration provisions of the Standard Terms and Conditions Governing the Employment of Filipino Seafarers On Board Ocean-Going Vessels (the "Standard Terms"). Section 29 of the Standard Terms governs Dispute Settlement Procedures and provides:

> In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbiter or panel of arbitors. If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the National Labor Relations Commission (NLRC) pursuant to the Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 or to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators to be appointed by the parties, the same shall be appointed from the accredited voluntary arbitrators of the National Conciliation and Mediation Board of the Department of Labor and Employment.

Latoja opposed the Motion to Compel Arbitration, filing a response that adopted the memoranda from the *Bautista* case. The District Court granted Carnival's Motion to Compel Arbitration, concluding that the dispute should be submitted

to arbitration pursuant to the terms of the parties' employment contract. Accordingly, the court denied Latoja's Motion to Remand and closed the case.

Latoja's appeal to the Eleventh Circuit Court of Appeals was held in abeyance pending a decision in *Bautista v. Star Cruises*, 396 F. 3d 1289 (11th Cir. 2005), pet. for cert. dismissed, 125 S. Ct. 2954 (2005), a case which presents the identical legal issues in this case. After briefing, the Eleventh Circuit affirmed the order compelling arbitration in this case without further discussion:

> As the appellant, Ruel D. Latoja, candidly concedes, his position in this appeal is squarely foreclosed by our decision earlier this year in *Bautista v. Star Cruises*....There is no material distinction between the two cases. Latoja seeks only to preserve his ability to seek certiorari review in the United States Supreme court, and he has done that.

II. ARGUMENT

A. This Proceeding Does not Present an "Important" Question of Federal Law Which "Should be" decided by this Court

1. The Landscape of the Question Presented, Which is the Interplay of Chapters 1 and 2 of Title 9, United States Code

The question for the Court is one of statutory construction, involving the interplay between the jurisdictional provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 and those of the Convention, enacted into positive law at 9 U.S.C. §§202-208 (the "Convention Act").

Specifically, Petitioner seeks review of rulings by the United States Court of Appeals for the Eleventh Circuit that the domestic "transportation workers" exception set forth in 9 U.S.C. § 1 of the FAA conflicts with, and therefore is preempted by, the Convention and §§ 202 and 208 of the Convention Act.

The FAA, 9 U.S.C. §§ 1 *et seq.*, was enacted in 1925 as positive law to overcome a stubborn hostility in the United States judiciary against enforcement of arbitration clauses. *Circuit City Stores v. Adams*, 532 U.S. 105, 111 (2001). The FAA requires enforcement of arbitration clauses in any "maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. "[C]ommerce" and "maritime transactions" are defined in 9 U.S.C. § 1. That section goes on to state that "nothing herein contained shall apply to contracts of employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce." *Id.* In *Circuit City* this Court held that this exception should be read narrowly in view of the broad and strong federal policy favoring arbitration, that employment contracts are "commercial" within the meaning of the FAA, and that the exception for workers engaged in commerce is limited to those "transportation workers" actually involved in the movement of goods. 532 U.S. at 118-19.

The Convention Act, 9 U.S.C. §§ 202-208, was enacted in 1970 to implement the United States' ratification of the Convention itself. *See* 9 U.S.C. § 201. The Convention Act evinces a federal policy in favor of arbitration in the international context which is as strong, if not much stronger, than arbitration in the domestic context. As federal courts have noted, where a party has made the bargain to arbitrate, the party should be held to it. "Throughout such an inquiry,

it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)(citations omitted). *Compare Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

The Convention Act states quite simply that an agreement to arbitrate falls under the Convention, "including" agreements covered by § 2 of the FAA. 9 U.S.C. § 202. The Convention in turn states:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration ... concerning a subject matter capable of settlement by arbitration. [***] [T]he courts of a Contracting State ... shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null, void or incapable of being performed.

Convention, Art. II, §§ 1, 3. There is no limiting language in the Convention, and the Convention Act limits the operation of the Convention merely to those relationships which are "commercial". 9 U.S.C. § 201 (HISTORICAL AND STATUTORY NOTES, n. 29).

Neither the texts nor histories of the Convention and the Convention Act suggest that their jurisdiction is limited exclusively to that of the FAA. To the contrary, the Convention Act states that Chapter 1 of Title 9 (the FAA) applies to cases governed by Chapter 2 of Title 9 (the Convention Act) only "to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208. Nothing in the Convention

or the Convention Act even remotely resembles the transportation workers' exception of the FAA. The courts below therefore correctly ruled that it cannot be read into the Convention Act.

2. Petitioner Presents no Compelling Reasons Calling for this Court's Involvement

Rule 10 of this Court's Rules of Procedure states that the Court will grant certiorari for only "compelling reasons." *S.Ct.R.* 10. Petitioner has presented this Court with no compelling reasons warranting review of the orders below.

Rule 10 lists examples of such "compelling reasons," most of which involve conflicts between a federal appellate opinion and opinions from 1) state courts of last resort, 2) other federal circuit courts of appeal, or 3) this Court itself. *S.Ct.R.* 10(a), (b). This case, however, does not present such a conflict - every federal judge known by Respondent to have addressed the question presented has agreed with the holding now before the Court: the "transportation workers exception" in 9 U.S.C. § 1 does not apply in situations governed by the Convention. *Lim v. Offshore Specialty Fabricators, Inc.*, 2005 U.S. App. LEXIS 4807 (5th Cir. 2005); *Bautista et al v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005); *Freudensprung v. Offshore Tech. Svc's, Inc.*, 379 F.3d 327 (5th Cir. 2004); *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030 (2002).[1]

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[1] *Inting v. Carnival Corp.*, No. 03-21160 (S.D. Fla. 2004); *Adolfo v. Carnival Corp.*, 2003 U.S. Dist. LEXIS 24143, No. 02-23672 (S.D. Fla. 2003); *Acosta v. Norwegian Cruise Line, Ltd.*, Case No. 03-22060-CIV-KING, 303 F. Supp. 2d 1327 (S.D.Fla. 2003);

Petitioner apparently seeks review under *S.Ct.R.* 10(c). *Compare Pet.Brief* at 15 ("a final decision by this court would be important for seamen and shipowners") *with S.Ct.R.* 10(c)(a lower court "has decided *an important* question of federal law that has not been, *but should be*, settled by this Court")(emphasis supplied). Yet Petitioner has not explained why the question presented is so important as to warrant certiorari review by this Court or why this Court should address it. He does not raise an issue concerning the international relations of the United States, the operations of the federal government, or the federal treasury. He does not discuss how a decision by this Court would impact state or local governments, or the citizenry of the United States. He does not demonstrate how a decision by this Court would influence future activities by lower courts.

Petitioner does not even explain why or how an opinion from this Court will be important to "seamen and shipowners." By contrast, the vast majority of cruise line headquarters are located in, and the vast majority of cruise ships sail from, ports located in states covered by the Fifth and Eleventh Circuits (Texas, Louisiana and Florida). Other foreign shipowners utilize these ports as well. Those courts are in agreement. As such both foreign shipowners and citizens of the United States can readily order their legal and business affairs with confidence in the state of the law.

Bautista et al v. Star Cruises, Inc. 286 F.Supp.2d 1352 (S.D.Fla. 2003); *Santos v. Carnival Corp.*, No. 03-20914 (S.D. Fla. 2003); *Jaranilla v. Megasea Mar., Ltd.*, 2002 U.S. Dist. LEXIS 16505, No. Civ.A.02-2048, (E.D. La. 2002); *Amon v. Norwegian Cruise Lines, Ltd.*, 2002 U.S. Dist. LEXIS 27064, No. 02-21025 (S.D. Fla. 2002).

Rather, Petitioner's position is simply that as seamen they are "wards of admiralty" and they should receive special consideration in the context of international arbitration. Petitioner expressly invokes the historical solicitude which United States courts hold for seamen of the United States. *See Pet.Brief* at 14-15 (discussing Justice Story's famous opinion in the maintenance & cure case of *Harden v. Gorden*, 11 F.Cas. 480 (No. 6047)(C.C. D.Me. 1823)). As discussed below, Petitioner's reliance on the "wards of admiralty" theory is misplaced because it is a domestic policy which has no application to international cases within the jurisdiction of the Convention.

3. The United States' Historic Solicitude for its Domestic Seamen Has No Relevance to Cases Governed by The Convention

The United States' domestic policies spelled out so eloquently in *Harden* derive from its desire to promote its own domestic merchant marine and its own international commerce:

> Beyond this, *is the great public policy of preserving this important class of citizens for the commercial service and maritime defense of the nation. Every act of legislation which secures their healths, increases their comforts, and administers to their infirmities, binds them more strongly to their country*; and the parental law, which relieves them in sickness by fastening their interests to the ship, is as wise in policy, as it is just in obligation.

Harden, 11 F. Cas. at 483 (emphasis supplied). *Compare Hutchinson v. Coombs*, 12 F. Cas. 1083, 1086 (No. 6,955) (D.C. ME 1825). Unlike the implicit assumption advanced

by Petitioner, *Pet.Brief* at 10-11, no United States court has ever held that a non-U.S. seaman such as Petitioner is automatically entitled to avail himself of these domestic policies. *See Lauritzen v. Larsen*, 345 U.S. 571 (1953)(refusing to apply U.S. law to claim brought in U.S. court by a Danish seaman, even though his employer was doing business in this United States). Most significantly, numerous U.S. courts have recognized that domestic policies cannot have influence when deciding whether an arbitration clause should be enforced under the Convention. *Vimar Seguros, supra*, 515 U.S. at 539 ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-39 & n. 21 (1985); *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-517 (1974).[2]

The courts below correctly determined that the FAA's "transportation workers" exception is an example of a domestic protection which does not inure to the benefit of non-U.S. seamen in the international arena, particularly in the

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[2] *See also Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982)(refusing to recognize public policy statute enacted by the Commonwealth of Puerto Rico as a defense to enforcement of an arbitration clause governed by the Convention); *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l' Industrie du Papier (RAKTA)*, 508 F.2d 969, 973-74 (2d Cir. 1974)(construing narrowly the "public policy" defense to enforcement of awards under Article V(2) (b)); *McCreary Tire & Rubber Co. v. CEAT*, 501 F.2d 1032 (3rd Cir. 1974)(observing that there is "nothing discretionary" about enforcement of arbitration clauses governed by Article II(3) of the Convention).

arena of international arbitration. This Court has itself noted that this exception resulted from the lobbying of powerful *domestic* unions, at a time when Congress had already enacted statutes governing the resolution of disputes between domestic seamen and their employers. *See Circuit City*, 532 U.S. at 119-121. Notably lacking in the history of the exception or in the text of the statute itself is any concern for arbitrations involving foreign seaman, such as Petitioner.

Any policies enunciated in case law which demonstrate solicitation for *domestic* seamen are trumped by the Convention itself, which creates positive law in favor of enforcing arbitration agreements involving *foreign* seamen and which preempts any statute or case law before it. Petitioner has not pointed this Court (or any other court) to any item in either the texts or the histories of the Convention and Convention Act demonstrating that anyone – domestic or foreign – was concerned with the arbitration of claims by non-U.S. seamen.

Instead Petitioner attempts to create an air of confusion by invoking the testimony of Ambassador Richard Kearney, given when presenting the Convention Act to Congress. Ambassador Kearney explained that the United States was adopting the Convention for purposes of enforcing arbitration agreements in only those relationships which are "commercial" under the national law of the United States. *See Pet.Brief* at 7-8, 11-12. He indicated that the term "commercial" is defined in 9 U.S.C. §1. *Idem.* Because that statute also sets forth the transportation workers' exemption from the FAA, Petitioner concludes that seamen's contracts are not "commercial" and makes the sweeping, utterly unfounded assertion that "seamen's contracts are not subject to arbitration under the national law of the United States[.]" *Id.* at 9.

The conclusions Petitioner draws from Ambassador Kearney's testimony are mistaken in two aspects.[3] First, it contradicts the plain meaning of § 1. That statute does not state that transportation worker employment contracts are not "commercial"; it states only that the FAA does not apply to them. *See Circuit City*, 532 U.S. at 109 ("Section 1 of the Federal Arbitration Act *excludes from the Act's coverage* contracts of employment of seamen,... .")(emphasis supplied). *See also Id.* at 133 (Souter, J. dissenting)("§ 1 *exempts from the Act's coverage* 'contracts of employment of seamen,... .'")(emphasis supplied).[4] Indeed, this Court itself has already determined that employment contracts are "commercial" within the meaning of the FAA. *Id.* at 118-19.

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[3] Petitioner also mis-cites *Udall v. Tallman*, 380 U.S. 1 (1965) for the proposition that federal courts must give Ambassador Kearney's testimony "great deference". As the courts below noted, *Udall* held that federal courts should pay such deference to the "officers or agency charged with [the statute's] administration." *Pet.Brief* at 20a; *quoting Udall*, 380 U.S. at 16. Assuming that Ambassador Kearney was concerned in any way with enforcement of arbitration against foreign seamen – a proposition completely belied by the entirety of his testimony – he was not such an officer or member of a federal agency; he was not even an elected official. *Compare Circuit City*, 532 U.S. at 120 (declining to put emphasis on testimony by non-member of Congress before a sub-committee: "Legislative intent is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources even more removed from the full Congress[.]").

[4] *Compare Valdes v. Swift Transp. Co., Inc.*, 292 F.Supp.2d 524 (S.D.N.Y. 2003)("Section 1 does not, however, in any way address the enforceability of employment contracts exempt from the FAA. It simply excludes these contracts from FAA coverage entirely.")

Second, it is most certainly not the national law of the United States that seamen in particular and transportation workers generally can never be compelled to arbitrate. The FAA and its exemption were enacted in 1925 as positive law to overcome the great judicial hostility towards arbitration clauses which then existed. *Circuit City*, 532 U.S. at 111. In § 1 the FAA states that it will not be the source of such positive law with regard to the limited class of contracts by which transportation workers are employed. However, when a source of positive law does apply to their disputes, transportation workers must arbitrate regardless of § 1. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 477 (1989)("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956)(upholding application of state arbitration law to an arbitration provision in a contract not covered by the FAA); *Palcko v. Airborne Express*, Inc., 372 F.3d 588 (3rd Cir. 2004), *cert denied*, 2005 U.S. LEXIS 448 (U.S., Jan. 10, 2005)(compelling plaintiff to arbitrate under Washington state arbitration statute even though she was a transportation worker within the meaning of 9 U.S.C. §1); *Air Line Pilots Ass'n, Int'l v. Midwest Express Airlines, Inc.*, 279 F.3d 553, 556 (7th Cir. 2002)(pilot employed under collective bargaining agreement which required arbitration could compel employer to arbitrate); *American Postal Workers Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 470-471 (11th Cir. 1987)(enforcing arbitration procedures in postal workers' collective bargaining agreement under 29 U.S.C. § 301 and 39 U.S.C. § 1208 even though the CBA was a transportation workers' "contract of employment" within the meaning of 9 U.S.C. § 1). *Compare U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351 (1970)(but for statutory right of access to courts for his specific type of claim,

ar[illegible]tion clause in seaman's collective bargaining agreement w[illegible] have been enforced under 29 U.S.C. § 301).[5]

This is a consummately international dispute governed by the Convention - *the contracts and arbitration clauses in question were drafted by a foreign government for use by its own citizens.* This Court itself has anticipated situations in which an arbitration clause covered by the Convention would not be enforceable under domestic law, and has expressly stated that in such circumstance domestic law must yield to the Convention:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the needs of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context.*
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> * * *
>
> National courts must shake off the old judicial hostility to arbitration, and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or

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[5] *See also Aasma v. Am. S.S. Owners Mut. Prot. and Indem. Ass'n., Inc.*, 95 F.3d 400 (6th Cir. 1996) (United States seamen must arbitrate asbestos injury claims against insurer of bankrupt shipowner in England); *Ones v. Miss. Valley Barge Line Co.*, 98 F. Supp. 787 (W.D. Penn. 1951)(seaman must arbitrate pursuant to terms of collective bargaining agreement); *see also, O'Dean v. Tropicana Cruises Int'l Inc.*, No. 98 Civ. 4543, 1999 U.S. Dist. LEXIS 7751 (S.D.N.Y. 1999)(interstate transportation worker).

> transnational tribunal. To this extent, at least, *it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.*

Mitsubishi, *supra*, 473 U.S. at 629, 638-39 (emphasis supplied, citations omitted). *Compare Sherk*, *supra*, 417 U.S. at 516-517 (noting that "[a] parochial refusal" by the courts of one country to enforce international arbitration agreements would frustrate the very purposes of the Convention).

This Court has also stated that Congress could, if it chose, exempt certain subjects from the reach of the Convention:

> Doubtless, Congress may specify categories of claims it wishes to reserve for our own courts without contravening this Nation's obligations under the Convention. *But we decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.*

Mitsubishi, 473 U.S. at 639, n. 21 (emphasis supplied). In that vein Congress knows fully well how to bring foreign seamen within the ambit of its domestic statutes and to make courts available to them when it so desires. *See e.g.*, 46 U.S.C. § 10313(i)(expressly extending U.S. seamen's wages statutes to foreign seamen "when in a harbor of the United States" and making the courts "available" to them). The plain and very simple fact is that Congress has never expressly directed our courts to refuse enforcement of arbitration clauses in the employment contracts of *foreign* seamen, let alone to disregard the choice of a foreign sovereign to require its seamen to arbitrate.

IV. CONCLUSION

Petitioner has offered no compelling reasons why this Court should take up this case. The courts below faithfully adhered to well established rules of statutory construction and the overwhelming federal policy in favor of arbitration in holding that the transportation workers exemption in § 1 of the FAA conflicts with the Convention Act. This Court has previously declined to review exactly the same holding. *Francisco v. Stolt Achievement MT*, 293 F.2d 270 (5th Cir. 2002), *cert denied*, 537 U.S. 1030 (2002). Since then nothing has changed; every federal court to address the question has agreed with *Francisco*.

WHEREFORE, Respondent respectfully requests that Petitioner's request for a writ of certiorari be denied.

Respectfully submitted,

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